

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
DEC 29 2010	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY:	DEPUTY

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOLENE HUNT,

Plaintiff,

v.

DOROTHY MARTIN, individually and in her
official capacity as Division Chief of the
State of Nevada Department of
Transportation, and STATE OF NEVADA, ex
rel. its Department of Transportation,

Defendants.

3:10-CV-00350-RCJ-(VPC)

ORDER

Presently before the Court is Plaintiff Jolene Hunt's Motion to Strike (#8) and Defendant State of Nevada ex rel. its Department of Transportation (the "State of Nevada")'s Motion to Dismiss (#10). The motions have been haphazardly briefed. The Court held oral argument on September 27, 2010. Defense counsel failed to appear at the scheduled time. The Court now issues the following order. IT IS HEREBY ORDERED that Plaintiff's Motion to Strike (#8) IS DENIED and the State of Nevada's motion to dismiss (#10) is GRANTED.

I. BACKGROUND

On February 17, 2009, Plaintiff filed her complaint against the State of Nevada and Defendant Dorothy Martin, individually and in her capacity as Division Chief of the Nevada Department of Transportation, in the Second Judicial District Court of the State of Nevada.

1 On February 25, 2009, summons and a copy of the complaint were delivered to the
 2 Director's Office of the Nevada Department of Transportation. On February 26, 2009,
 3 summons and a copy of the complaint were served upon Division Chief Martin. On May
 4 24, 2010, after the State of Nevada's counsel had repeatedly alerted Plaintiff to her
 5 defective service, a summons and a copy of the complaint was served upon the Office of
 6 the Attorney General.

7 On May 26, 2010, the State of Nevada filed a motion to dismiss Plaintiff's complaint
 8 against it for failure to effect timely service. Plaintiff did not file a timely response, even
 9 after the court granted an extension of time to respond.

10 On June 10, 2010, the last day for Plaintiff to file her response, Defendants removed
 11 the action to federal court.

12 On June 24, 2010, Plaintiff filed a motion to strike the State of Nevada's motion to
 13 dismiss that had been filed in the state court and attached to the petition for removal. The
 14 motion to strike lacked an accompanying memorandum of support.

15 On June 25, 2010, the State of Nevada filed an opposition to the motion to strike
 16 and reply in support of its motion to dismiss. On June 28, 2010, the State of Nevada filed
 17 its motion to dismiss anew in this Court. Plaintiff filed a reply to the opposition to its motion
 18 to strike on August 2, 2010.¹

19 20 II. ANALYSIS

21 Sufficiency of process prior to removal is determined under state law. *Lee v. City of*
 22 *Beaumont*, 12 F.3d 933, 936–37 (9th Cir. 1993), *overruled on other grounds*, *Cal. Dep't of*
 23 *Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008). Nevada has waived its
 24 sovereign immunity subject to restrictions. One restriction is that:

25 In an action against the State of Nevada, the summons and a copy of the
 26 complaint must be served upon:

27 (a) The Attorney General, or a person designated by the Attorney General,
 at the Office of the Attorney General in Carson City; and

28 ¹ A party only has 11 days after the service of a response to file a reply. LR 7-2(c).

1 (b) The person serving in the office of administrative head of the named
2 agency.

3 Nev. Rev. Stat. § 41.031(2). "All . . . service and process issued or ordered by a court of
4 competent jurisdiction wherein the Department [of Transportation] is named as a defendant
5 must be personally served upon both the Director and the Chair of the Board or, in the
6 absence of the Director and the Chair of the Board, the process must be served personally
7 upon both the Secretary of State and one of the Deputy Directors." Nev. Rev. Stat.
8 § 408.116(1).

9 In Nevada, "[i]f a service of the summons and complaint is not made upon a
10 defendant within 120 days after the filing of the complaint, the action shall be dismissed as
11 to that defendant without prejudice upon the court's own initiative with notice to such party
12 or upon motion, unless the party on whose behalf such service was required files a motion
13 to enlarge the time for service and shows good cause why such service was not made
14 within that period." Nev. R. Civ. P. 4(i).

15 Plaintiff argues that she effected sufficient service under the Federal Rules by
16 serving Managing Agent Marianne Isaacs on behalf of the State of Nevada on February
17 25, 2009. Plaintiff relies on Rule 4(j) of the Federal Rules of Civil Procedure, which allows
18 service of a state government in federal court by "delivering a copy of the summons and of
19 the complaint to its chief executive officer." Fed. R. Civ. P. 4(j)(2)(A). Plaintiff's argument
20 fails first because the Federal Rules do not govern service prior to removal and second
21 because Isaacs was not Nevada's chief executive officer.

22 Next Plaintiff argues that service was properly effected on the State of Nevada on
23 May 26, 2010. This may be true, but this far exceeds the 120-day limit for service and
24 Plaintiff has made no attempt to argue good cause for her failure to meet the deadline.

25 Finally, Plaintiff argues that the State of Nevada's motion to dismiss is moot
26 because it was lodged in the state court under state rules while federal rules govern the
27 present action. Whether or not the State of Nevada's motion cites Rule 12 of the Federal
28 Rules of Civil Procedure is immaterial as long as it is authorized and meritorious under the

1 federal rules.

2 In sum, Plaintiff has offered no justifications for his failure to timely serve the State
3 of Nevada. Therefore, the Court must dismiss the complaint against the State of Nevada
4 without prejudice. See Nev. R. Civ. P. 4(I).

5
6 **III. CONCLUSION**

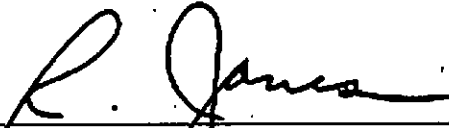
7 Accordingly, IT IS ORDERED that Plaintiff's Motion to Strike (#8) IS DENIED.

8 IT IS FURTHER ORDERED that the State of Nevada's motion to dismiss (#10) is
9 GRANTED.

10 IT IS FURTHER ORDERED that Plaintiff's complaint against the State of Nevada is
11 DISMISSED WITHOUT PREJUDICE.

12 IT IS SO ORDERED.

13 DATED: December 29, 2010

14
15
16 
17 Robert C. Jones

18 UNITED STATES DISTRICT JUDGE
19
20
21
22
23
24
25
26
27
28